Government Commercial Function

Exemptions cheat sheet

Private utilities

This cheat sheet is a quick reference guide to the exemptions and differences for private utilities within the Procurement Act 2023.

Private utilities are other entities (i.e. not public authorities or public undertakings) that carry out a utility activity. Private utilities are only covered by the Procurement Act where they have been granted a special or exclusive right to carry out a utility activity.

It is not possible to have a definitive list of utilities as structures can be complex or change over time and whether an entity has been granted special or exclusive rights can change. Utilities will need to consider whether they are a public authority, public undertaking or private utility using the definitions in section 2(2) of the act.

The Procurement Act part 1 of schedule 4 (utility activities) lists utility activities and part 2 of schedule 4 lists activities that are not, at a particular point in time, considered utility activities within the meaning of the act. This largely mirrors the coverage of the UCR 2016 - except for the removal of postal services entirely.

Utility activities are activities connected with the provision or operation of networks that provide:

1. gas and heat
2. electricity
3. water
4. transport services (rail, tram, bus)
5. ports and airports
6. extraction of oil and gas and exploration for, or extraction of coal or other solid fuels

Scope, definitions and general principles

Thresholds (schedule 1) - schedule 1 of the act will be amended to reflect the currently in force thresholds set out here	Utility "works contract" (i.e. "construction services") = £5,372,609 Utility non-works contract (i.e. "Goods", "Services") = £429,809 Utility light touch contract = £884,720 Concession contract (including light touch, Defence and security) = £5,336,937
Below-threshold contracts (part 6 - sections 84 to 88)	A utilities contract is exempt from the rules governing regulated below-threshold contracts.
The national procurement policy statement (section 13)	The duty to have regard to the national procurement policy statement does not apply to private utilities.
The Wales procurement policy statement (section 14)	The duty to have regard to the Wales procurement policy statement does not apply to private utilities.
Pipeline notices (section 93)	Private utilities are exempt from publishing pipeline notices.
Exempted contracts (schedule 2)	Paragraph 5 exempts utilities contracts awarded by a joint venture between utilities to one of those joint venture members, and vice versa. Paragraph 6 exempts utilities contracts awarded by a utility to an affiliate and by a utility that is a joint venture to an affiliate of any member of that joint venture. Paragraph 21 exempts contracts for public passenger transport services that are awarded under separate legislation - that legislation is

	specified at section 136(11) of the Railways Act 1993. Paragraph 31 exempts utilities contracts awarded for the purpose of further sale or lease to third parties, provided the utility does not have a special or exclusive right to sell or lease the goods, services or works purchased and the market is open. This does not apply where the utility is a centralised procurement authority. Paragraph 32 exempts utilities contracts for the purchase of water by utilities carrying out a utility activity in paragraph 3(1) of schedule 4 (provision or operation of a fixed network or the supply of drinking water to such a fixed network). Paragraph 33 exempts utilities contracts for purchases of energy, or fuel for the production of energy, by utilities carrying out a utility activity in paragraphs 1, 2 or 6 of schedule 4 (gas and heat, electricity and extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels). Paragraph 34 operates to ensure that contracts for the purpose of the activities set out in part 2 of schedule 4 are exempt from the act.

Transparency

Pipeline notices (section 93)	Private utilities are exempt from publishing pipeline notices.
Preliminary market engagement notices (section 17) - the act will be amended to reflect changes made in the Procurement Regulations 2024	Private utilities are exempt from publishing preliminary market engagement notices.

Tender notices and associated tender documents (section 21)	Where a utilities contract is to be awarded under a utilities dynamic market established by reference to a qualifying utilities dynamic market notice (see section 40) the tender notice is not published, but utilities must instead provide it directly to existing members of the market.
Contract details notices and publication of contracts (section 53)	Private utilities are exempt from publishing contract details notices and copies of contracts.
Information about payments under public contracts (section 70)	Private utilities are exempt from publishing specified payment information where payments more than £30,000 are made under utilities contracts.
Key performance indicators (section 52)	Setting and publishing key performance indicators does not apply to a public contract awarded by a private utility.
Assessment of contract performance (section 71)	Assessing and publishing further information on key performance indicators does not apply to private utilities (even if KPIs have been set).
Contract change notice (section 77)	Publishing a copy of the contract as modified or the modification does not apply to a contract awarded by a private utility.
Contract termination notices (section 80)	Publishing a contract termination notice does not apply to private utilities.
Procurement termination notices (section 55)	Private utilities are exempt from publishing procurement termination notices.
Dynamic market notices (section 39)	The obligation to publish a dynamic market notice after a dynamic market ceases to operate does not apply to private utilities.

Electronic communications (section 96)	Electronic communications systems do not need to be free of charge and readily accessible to suppliers in relation to a utilities dynamic market. See section 38(3) - fees may be charged in connection with obtaining and maintaining membership of a utilities dynamic market.

Procedures

Vertical and horizontal arrangements (schedule 2)	Vertical and horizontal exemptions do not apply to private utilities or public undertakings. The joint venture and affiliated persons exemptions for utilities contracts provide a similar exemption for all utilities.
Preliminary market engagement notices (section 17) - the act will be amended to reflect changes made in the Procurement Regulations 2024	Private utilities are exempt from publishing preliminary market engagement notices.
Time limits (section 54)	No minimum timescales are mandated for tenders from “pre-selected suppliers” (i.e. suppliers that have been required to satisfy conditions of participation before submitting tenders or are members of a dynamic market) where the tendering period is agreed by all. In the absence of such agreement, the minimum timescales is 10 days.

Competitive flexible procedure

Time limits (section 54)	No minimum timescales are mandated for tenders from "pre-selected suppliers" (i.e. suppliers that have been required to satisfy conditions of participation before submitting tenders or are members of a dynamic market) where the tendering period is agreed by all. In the absence of such agreement, the minimum timescales is 10 days.

Frameworks and dynamic markets

Framework agreements: maximum term (section 47)	The maximum term does not apply to a framework awarded by a private utility - the maximum terms under section 49 for open frameworks do apply to utilities.
Dynamic markets: establishment (section 35)	Utilities can establish utilities dynamic markets - established only for the purpose of the award of utilities contracts by utilities.
Qualifying utilities dynamic market notices: no duty to publish a tender notice (section 40)	Utilities that establish dynamic markets using a qualifying utilities dynamic market notice do not publish a tender notice for the purpose of inviting suppliers to submit a request to participate or tender; instead a tender notice must be provided to members of the market or appropriate part of the market.

Qualifying utilities dynamic market notices: no duty to publish a tender notice (section 40)	Where a qualifying utilities dynamic market notice has been used, you do not have to consider any applications for membership to the market from suppliers that wish to participate in a particular procurement being carried out under the utilities dynamic market.
Dynamic markets: fees (section 38)	Utilities dynamic markets **may** provide for the charging of fees to suppliers in connection with obtaining and maintaining membership of the market. They **can not** provide for charging fees to suppliers that are awarded a contract by reference to their membership of the utilities dynamic market.
Dynamic markets (including utilities dynamic markets) cannot generally be used to award regulated below-threshold contracts, as they cannot be restricted by reference to a supplier's suitability (section 85(1)), and suppliers have already been assessed based on this to become a member of the dynamic market.	Dynamic markets cannot generally be used to award regulated below-threshold utilities contracts - dynamic markets can be used to award works contracts above the values set out in section 85(3).
Dynamic market notices (section 39)	The obligation to publish a dynamic market notice after a dynamic market ceases to operate does not apply to private utilities.

Supplier selection

Meaning of excluded and excludable supplier (section 57)	Private utilities have a wider discretion on whether to exclude excluded suppliers and should consider any reference to "excluded" suppliers as "excludable" suppliers.

Assessment and award

Procurement termination notices (section 55)	Private utilities do not have to publish a procurement termination notice.
Contract details notices and publication of contracts (section 53)	The requirements to publish a contract details notice and a copy of the contract does not apply to private utilities.
Standstill periods on the award of contracts (section 51)	The standstill periods do not apply to private utilities when the award is made under direct award in special cases (section 41) or switching to a direct award (section 43). A standstill period is also not required for a contract that is awarded in accordance with a framework, including a utilities framework, or by reference to a dynamic market, which includes utilities dynamic markets (including utilities dynamic markets established pursuant to a qualifying utilities dynamic market notice).
Contract award notices and assessment summaries (section 50)	An assessment summary is not required for a utilities (or other) contract awarded under a framework.

Remedies, procurement oversight and the debarment list

Procurement investigations (section 108)	A private utility is not considered a "relevant contracting authority" for the purposes of this section and as a result is not subject to procurement investigations under this section (although they may be required to have regard to guidance published following an investigation (see section 109)).

Contract governance

Contract change notices (section 75)	The requirement to publish a contract change notice before modifying a contract does not apply if the contract was awarded by a private utility.
Publication of modifications (section 77)	The requirement to publish a modified contract or modification does not apply if the contract was awarded by a private utility.
Key performance indicators (section 52)	The requirement to set and publish key performance indicators does not apply to utilities contracts awarded by a private utility.
Assessment of contract performance (section 71)	Assessing and publishing performance information does not apply to private utilities (even if KPIs have been set).
Information about payments under public contracts (section 70)	Private utilities are exempt from publishing specified payment information where payments more than £30,000 are made under utilities contracts.
Implied payment terms in contracts (section 68)	The 30 day implied terms are not implied in a utilities contract awarded by a private utility.
Implied payment terms in sub-contracts (section 73)	Payment terms are not implied into public sub-contracts that are for the purpose of performing (or contributing to the performance of) all or any part of a utilities contract awarded by a private utility.
Payments compliance notices (section 69)	Publishing a payments compliance notice does not apply to private utilities.

Contract termination notices (section 80)	The requirement to publish a contract termination notice does not apply to private utilities.
Contract modifications (schedule 8 permitted contract modifications 4(2), 5(2) and 8(2))	The 50% financial cap on the value of permitted modifications does not apply if the contract being modified is a utilities contract.